(1) Supreme Court, U.S.
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No. 03-1582

In The
Supreme Court of the United States

ASSOCIATED BUILDERS AND CONTRACTORS OF SOUTHERN CALIFORNIA, INC.,

Petitioner,

v.

LUCILLE ACOSTA, AN INDIVIDUAL IN HER OFFICIAL CAPACITY AS ACTING CHIEF, DIVISION OF APPRENTICESHIP STANDARDS; JOHN REA, AN INDIVIDUAL IN HIS OFFICIAL CAPACITY AS ACTING DIRECTOR OF THE DEPARTMENT OF INDUSTRIAL RELATIONS AND ADMINISTRATOR OF APPRENTICESHIP OF THE STATE OF CALIFORNIA; YVONNE DE LA PENA, AN INDIVIDUAL, IN HER OFFICIAL CAPACITY AS CHAIRPERSON, CALIFORNIA APPRENTICESHIP COUNCIL, A PUBLIC BODY OF THE STATE OF CALIFORNIA, STATE BUILDING AND CONSTRUCTION TRADES COUNCIL OF CALIFORNIA, AFL-CIO,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Decision of the United States Court of Appeals for the Ninth Circuit, that California law is not preempted by ERISA when, through amendments to 8 Cal. Code Regs. § 208(b)-(c), California purports to establish minimum wages and benefits on public and private construction projects for state-registered apprentices, should be reversed and summarily vacated because:

(a) The Ninth Circuit Court relied on this Court's opinion in *Division of Labor Standards Enforcement v. Dillingham Construction*, 519 U.S. 316 (1997) ("*Dillingham I*") which interprets the public works laws of the State of California as they apply to the regulation of ERISA apprenticeship trusts as "voluntary;"

(b) Such interpretation and application of *Dillingham I* cannot be relied upon as a correct interpretation of California law as confirmed in the State of California's regulatory posture in other pending litigation, *City of Long Beach v. Department of Industrial Relations*, 110 Cal.App.4th 636, 1 Cal.Rptr.3d 837, *petition for review granted*, No. S118450 (California Supreme Court October 1, 2003), wherein the State has called upon the Court to express that compliance with public works apprenticeship requirements are a "matter of state wide concern" and, therefore, that the public works laws of the State of California as they apply to the regulation of ERISA apprenticeship trusts are not "voluntary;" and

QUESTIONS PRESENTED – Continued

(c) In another matter, wherein the United States Court of Appeals for the Eighth Circuit in *Minnesota Chapter of Associated Builders and Contractors, Inc. v. Minnesota Dept. of Public Safety*, 267 F.3d 807 (8th Cir. 2001) interpreted a comparable rule of mandatory state apprenticeship law and found ERISA preemption, California law is likewise preempted by ERISA.

LIST OF PARTIES

1. The names of the parties to this proceeding are those contained in the caption of this case, with the following changes. Lucille Acosta has replaced Henry P. Nunn III as successor in office and is therefore automatically substituted as a party pursuant to Supreme Court Rule 35.3; John Rea has replaced Chuck Cake as successor in office and is therefore automatically substituted as a party pursuant to Supreme Court Rule 35.3; Yvonne de la Pena has replaced Jeannie Holmes as successor in office and is therefore automatically substituted as a party pursuant to Supreme Court Rule 35.3.

CORPORATE DISCLOSURE

Pursuant to Supreme Court Rule 29.6, as to Petitioner Associated Builders and Contractors of Southern California, Inc., there are no parent corporations or publicly held companies holding 10% or more of Petitioner's stock.

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PETITION FOR WRIT OF CERTIORARI

Associated Builders and Contractors of Southern California, Inc. ("ABC SoCal") petitions for a Writ of Certiorari to review the Order and Amended Opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on February 17, 2004.

OPINIONS BELOW

The Order and Amended Opinion of the United States Court of Appeals for the Ninth Circuit is published at 356 F.3d 979 (9th Cir. 2004) and appears in the Appendix to this Petition ("Pet. App.") at App. 1 – App. 24. The Stipulation and Order for Entry of Final Judgment of the United States District Court for the Central District of California in Case No. SA02-131AHC is unpublished and is set out in Pet. App. at App. 25 – App. 34.

JURISDICTION

The decision of the United States Court of Appeals for the Ninth Circuit, as amended, in the case of *Associated Builders & Contractors of Southern California, Inc. v. Nunn*, 356 F.3d 979 (9th Cir. 2004), was filed on February 17, 2004. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The relevant statutory provisions are set forth herein and at Appendix A and include the following:

A. Employee Retirement Income Security Act ("ERISA"), is codified at 88 Stat. 829, 29 U.S.C. § 1001 *et seq*. The relevant provision of ERISA is its express preemption clause which provides that it "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan. . . ." 29 U.S.C. § 1144(a).

B. CAL. CODE REGS., Tit. 8, section 208, Section(s) (b) and (c) are set out in Pet. App. at App. 35 – App. 38.

STATEMENT OF THE CASE

This case presents important issues regarding regulatory provisions which are direct and mandatory in their impact on apprenticeship trusts which have divided the lower courts, potentially set a circuit court against the courts of the State of California and caused confusion with prior precedent of this Court.

Factual Background

California's apprenticeship framework is overseen by the California Apprenticeship Council ("CAC"). The CAC is a seventeen-member body comprised of representatives of business, labor, government, education and the general public. The CAC amended its regulations, effective February 16, 2002, and those amended regulations are challenged in this case. The regulation at issue is Title 8, California Code of Regulations, Section 208, specifically Sections 208(b) and (c). Sections 208(b) and (c) set out the

minimum wage scale that an apprenticeship program must meet in order to receive approval by the State of California on California private and public works projects. Section (c), which is the focus of this Petition, purports to set wages that must be paid to apprentices on private (non-public works) projects.

In 2002, Petitioner Southern California Chapter of Associated Builders and Contractors, Inc. brought suit against the Chief of the California Division of Apprenticeship standards, in his official capacity, in federal district court for the proposed implementation of the new regulation governing apprentices. Petitioner sought a declaration that Sections 208(b) and (c) were preempted, *inter alia*, by ERISA, and additionally sought a temporary restraining order, preliminary and permanent injunction enjoining Defendants from applying or enforcing the new regulations. The district court adjudicated the case on the merits, finding jurisdiction existed but ruled against Petitioner's request for an injunction.

In order to conserve scarce resources and move on with an appeal of the denial of the preliminary injunction, the parties then stipulated that, pursuant to FRCP 65(a)(2), the court could order the trial of the action on the merits to be consolidated with the hearing of the application for the preliminary injunction. In so doing, the court entered judgment as to Petitioner's complaint and adopted its findings of fact and conclusions of law in its April 11, 2002 Order Denying Preliminary Injunction as the final findings of fact and conclusions of law in the case. Petitioner was able to preserve its right to appeal all of the contentions raised in its requests for declaratory and injunctive relief. The parties so stipulated and the court entered the Stipulation and Order for Entry of Final

Judgment on June 17, 2002, set out in Pet. App. at App. 25 – App. 34.

Petitioner then timely appealed the district court's denial of its requests for declaratory and injunctive relief to the Ninth Circuit Court of Appeals. The Ninth Circuit issued its amended opinion in *Associated Builders & Contractors of Southern California, Inc. v. Nunn*, 356 F.3d 979 (9th Cir. 2004, *as amended* February 17, 2004). See App. 1 – App. 24.

Affirming the district court's findings, the Ninth Circuit Court found, in part, that ERISA did not preempt Section 208 because the provisions did "not act immediately or exclusively upon ERISA plans." *Id.* at 986. Further, the Ninth Circuit held that an attribute of California's prevailing wage law, its apprenticeship regulations, were implicitly *not* a matter of statewide regulatory concern. Relying on the interpretation of California law set out in the United States Supreme Court decision in *Division of Labor Standards Enforcement v. Dillingham Construction*, 519 U.S. 316 (1997) ("*Dillingham I*"), the Court held that the decision to participate in apprenticeship and prevailing wage construction was "voluntary."

Meanwhile, in the midst of Petitioner's federal court litigation and appeals process, a California Court of Appeal, the Court of Appeal for the Second Appellate District, Division Seven, overturned a trial court's decision holding that as a charter city, the City of Long Beach enjoyed autonomous rule over its "municipal affairs" pursuant to article XI, section 5 of the California

Constitution[1] and that this "charter city" exemption applied, if the project was determined to be a public works project. In overturning the trial court, the court of appeal found that prevailing wages on a public works project were "a matter of statewide concern" and that the "charter city" exemption did not apply. *City of Long Beach v. Department of Industrial Relations*, 110 Cal.App.4th 636, 660, 1 Cal.Rptr.3d 837 (2003), *review granted*, No. S118450 (California Supreme Court October 1, 2003) ("*Long Beach*").

The California Supreme Court accepted the City's Petition for Review on October 1, 2003. The California Supreme Court's case summary on its web site of the issue on review in *Long Beach* sets out the following issue on which review was granted, specifically: "Does the prevailing wage law (Labor Code, sections 1720-1861), which requires a contractor who performs work on any 'public work' within the state to pay prevailing wages to its employees, involve 'a matter of statewide concern' so that the statute is applicable to a public works project in a charter city, even if the construction of the project would otherwise involve a 'municipal affair'? (See *City of Pasadena v. Charleville* (1932) 215 Cal. 384)."[2] Thereafter, many

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[1] SEE CAL. CONST. art. XI, section 5, subdivision (a) which states in pertinent part: "It shall be competent in any city charter to provide that the city governed thereunder may make and enforce all ordinances and regulations in respect to municipal affairs, subject only to restrictions and limitations provided in their several charters and in respect to other matters they shall be subject to general laws."

[2] The official record and docket of matters on review to the California Supreme Court wherein the above information is reported may be found at www.appellatecases.courtinfo.ca.gov and is indexed according to the California Supreme Court case number – here Case No. S118450.

entities sought and received permission to file amicus curiae briefs with the Court, both in support of the City's Petition and in support of the court of appeal's decision. The position of the Attorney General of the State of California, set out in the *Brief Amicus Curiae of Attorney General Bill Lockyer In Support of Appellant*, is set out at Pet. App. at App. 35 – App. 50. Briefing is now complete and the matter is submitted pending scheduling of oral argument to the California Supreme Court.

Since *Dillingham I* was decided, the United States Court of Appeals for the Eighth Circuit has clearly held that where regulatory provisions are direct and mandatory in their impact on apprenticeship trusts, such regulation does, in fact, violate ERISA. *Minnesota Chapter of Associated Builders and Contractors, Inc. v. Minnesota Dept. of Public Safety*, 267 F.3d 807 (8th Cir. 2001).

If the California Supreme Court decides that public works "prevailing wages" and related apprenticeship requirements are "a matter of statewide concern," then it will be by recognizing it as part of a comprehensive and mandatory scheme applicable to all contractors and apprentice trusts in the State of California. Such a decision necessarily impacts this Court's reading of California law upon which the Ninth Circuit purports to rely and catalyzes a critical conflict between the circuits on this important issue.

REASONS FOR GRANTING THE WRIT

The Petition for Writ of Certiorari Should Be Granted Because Questions Presented Here Highlight Conflicting Opinions Among the Circuit Courts Concerning ERISA Preemption and Application of State Prevailing Wage Laws

In *Dillingham I*, this Court held that California's scheme of public works and apprenticeship regulations exists as a voluntary economic incentive, rather than a mandatory requirement, and, therefore, refused to consider whether state mandated requirements affecting such plans were unlawful under ERISA. In the opinion below, relying on *Dillingham I*, the Ninth Circuit applied this analysis to a state statute that required payment of certain predetermined public works prevailing wages to apprentices participating in state approved and ERISA regulated apprenticeship trusts, concluding that the voluntary nature of the participation by contractors attenuated any potential interference with the operation of such programs.

In the years since *Dillingham I*, the United States Court of Appeals for the Eighth Circuit has clearly held that where regulatory provisions are direct and mandatory in their impact on apprenticeship trusts, such regulation does violate ERISA. In *Minnesota Chapter of Associated Builders and Contractors, Inc. v. Minnesota Dept. of Public Safety*, 267 F.3d 807 (8th Cir. 2001) ("*Minnesota ABC*"), the Eighth Circuit determined that Minnesota's requirement that all sprinkler contractors register all of their apprentices in a state-approved training program "does more than simply provide a powerful economic incentive, it prevents the use of apprentices who are not registered in approved programs." *Id.* at 815.

After the instant decision was issued and while the period for the filing of this Petition has been running, the California Supreme Court granted a Petition for Review in the case of *City of Long Beach v. Department of Industrial Relations*, 110 Cal.App.4th 636, 1 Cal.Rptr.3d 837 (2003), *review granted*, No. S118450 (California Supreme Court October 1, 2003) ("*Long Beach*"). In that case, in which briefing has now been completed, the issue presented to the California Supreme Court includes reconsideration of the nature and scope of California prevailing wage and apprenticeship law.

The position taken to California's high court by its own attorney general in *Long Beach* is informative. In his amicus brief, filed as a matter of right under California law, the Attorney General of the State of California declares that "Apprenticeship Programs Integrated Into the State's Prevailing Wage Law Affirm The State's Interest In Training A Skilled Construction Workforce," noting that the "apprenticeship provisions require contractors on public works projects to employ apprentices. (See California Labor Code, section 1775, subd. (b) and (c))." The Attorney General's brief is set out in Pet. App. at App. 35 – App. 50.

There is remarkably little wiggle room to the phrase "require" in the context in which it is presented under ERISA preemption analysis. To the extent that this view is adopted by the California Supreme Court, this Court's characterization of California law in *Dillingham I* will no longer be accurate, the finding that issues of ERISA preemption are not factually presented will be wrong and the extant conflict between the decision of the United States Court of Appeals for the Eighth Circuit and the decision of the Court below will be critical for resolution.

Furthermore, to avoid future mischief, as a decision premised on an inaccurate and/or outdated interpretation of California law, *Dillingham I* should be clearly identified by this Court as not valid precedent and should, in pertinent part, be distinguished or withdrawn by this Court.

CONCLUSION

For the foregoing reasons, the Court is urged to grant this Petition for Writ of Certiorari.

Respectfully submitted,

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May 2004

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ASSOCIATED BUILDERS AND CONTRACTORS OF SOUTHERN CALIFORNIA, INC., a California corporation,

Plaintiff-Appellant,

v.

HENRY P. NUNN, III, an individual in his official capacity as Chief, Division of Apprenticeship Standards; CHUCK CAKE, an individual in his official capacity as Director of The Department of Industrial Relations and Administrator of Apprenticeship of the State of California; JEANNIE HOLMES, an individual, in her official capacity as Chairperson, California Apprenticeship Council, a public body of the State of California,

Defendants-Appellees,

STATE BUILDING AND CONSTRUCTION TRADES COUNCIL OF CALIFORNIA, AFL-CIO,

Defendant-intervenor-Appellee.

No. 02-56735

D.C. No. CV-02-00131-AHS

ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the Central District of California
Alicemarie H. Stotler, District Judge, Presiding

Argued and Submitted
October 8, 2003 – Pasadena, California

Filed January 16, 2004
Amended February 17, 2004

Before: Stephen Reinhardt, Ferdinand F. Fernandez, and Johnnie B. Rawlinson, Circuit Judges.

Opinion by Judge Reinhardt

COUNSEL

Dennis B. Cook, Ronald W. Brown, and Jessavel Y. Wong, Sacramento, California, for the plaintiff-appellant.

John M. Rea, Steven A. McGinty, and John A. Siqueiros, California Department of Industrial Relations, Los Angeles, California, for the defendants-appellees.

Stephen P. Berzon, Scott A. Kronland, and Linda Lye, San Francisco, California, for the intervenor-appellee.

John J. Davis, Jr. and Michael T. Anderson, San Francisco, California, for the amici curiae.

ORDER

The opinion filed January 16, 2004, is hereby amended as follows:

1. At Slip Op. at 540, replace the first sentence of the first full paragraph with: "Unlike the provisions preempted in *Minnesota ABC*, § 208 does not require

that contractors maintain state-approved apprenticeship programs or that they hire registered apprentices in most circumstances."

2. At Slip Op. at 540, footnote 4, replace the second sentence with: "This is contrary to the interpretation of § 1777.5 in *Dillingham I*, which construed California's regulatory scheme to permit two options in most circumstances – either contractors hire registered apprentices and pay them the special apprenticeship rate or they hire whomever they wish and pay the prevailing journeyman wage. *See Dillingham I*, 519 U.S. at 320, 332; *see also* 8 Cal. Code Reg. § 230.1(a)."

3. At Slip Op. at 549, replace the second sentence of the first full paragraph with: "California contractors are, for example, under no obligation to hire apprentices from state-approved programs for private construction projects or for public projects in most circumstances."

OPINION

REINHARDT, Circuit Judge:

By participating in a federal-state partnership that regulates apprenticeship standards, California encourages employers and unions to support training and education programs for citizens who seek access to the building construction trades and other skilled jobs. Although the goal of California's apprenticeship programs is to promote economic opportunity, its regulations have caused considerable concern to the employers affiliated with the Associated Builders and Contractors of Southern California, Inc. ("Associated Builders"). In February 2002, Associated Builders sought an injunction to prevent California officials from implementing amendments to 8 Cal. Code Regs.

§ 208(b)-(c), the subsections of California's regulations that establish minimum wages and benefits on public and private construction projects for state-registered apprentices.

Associated Builders argues that these provisions, as amended, are preempted by the Employee Retirement Income Security Act ("ERISA"), 88 Stat. 829, *codified as amended at* 29 U.S.C. § 1001 *et seq.*, and by the National Labor Relations Act ("NLRA"), 49 Stat. 449, *codified as amended at* 29 U.S.C. § 151 *et seq.* The district court denied Associated Builders' motion for a preliminary injunction. It determined that Associated Builders had little likelihood of success on the merits on its facial challenge to these provisions because they are part of the same regulatory scheme that the Supreme Court held not to be preempted by ERISA, *California Div. of Labor Standards v. Dillingham,* 519 U.S. 316 (1997) ("*Dillingham I*"), and that the Ninth Circuit, on remand, held not to be preempted by the NLRA. *Dillingham v. Sonoma County,* 190 F.3d 1034 (9th Cir. 1999) ("*Dillingham II*").

The parties stipulated to the entry of a final judgment based upon the district court's order denying the preliminary injunction. Pursuant to Fed. R. Civ. P. 65(a)(2), the district court entered a final judgment, which Associated Builders appeals. We find that §§ 208(b)-(c), as amended, are not preempted by either ERISA or the NLRA.

I. BACKGROUND

Since the founding of the American republic, states have regulated training programs for individuals seeking to enter skilled crafts, in order to prevent their exploitation by employers. *See generally W.J. Rorabaugh, The*

Craft Apprentice: From Franklin to the Machine Age in America (1986). California has regulated apprenticeships since at least 1858, when the legislature enacted a statute that, among other provisions, required masters to offer apprentices a basic education. 1858 Cal. Stat., ch. 182, pp. 134-37, *codified in* Cal. Civ. Code §§ 264-274 (*subsequently repealed and superseded by* 1937 Cal. Stat., ch. 90).

California and other states were encouraged to take additional steps to regulate apprenticeships in 1937, when Congress passed the National Apprenticeship Act, 50 Stat. 664, *codified as amended at* 29 U.S.C. § 50 *et seq.* Known as the Fitzgerald Act, this legislation directs the Secretary of Labor "to cooperate with State agencies engaged in the formulation and promotion of standards of apprenticeship. . . . " 29 U.S.C. § 50. In response to this federal encouragement, California passed the Shelley-Maloney Apprentice Labor Standards Act in 1939, which created the regulatory framework that governs apprenticeship in the state to this day. 1939 Cal. Stat., ch. 220, *codified as amended at* Cal. Lab. Code § 3070 *et seq.* (2003).

The goals of California's regulatory scheme are to "foster, promote, and develop the welfare of the apprentice and industry, improve the working conditions of apprentices, and advance their opportunities for profitable employment. . . . " Cal. Lab. Code § 3073 (2003). California fulfills these goals by offering a variety of incentives to encourage apprenticeship programs to seek state approval, which can be obtained if the programs comply with specified state standards. 8 Cal. Code Regs. § 212. Among the incentives that state-approved programs receive are direct financial assistance and automatic certification for relevant federal programs. Cal. Lab. Code § 3074; 29 C.F.R. § 29.12. Additionally, apprentices who

enroll in state-sponsored programs (referred to as "registered" apprentices in the California Code) receive a journeyman's certificate upon completion of their training. Contractors who hire apprentices from these state-approved programs receive certain benefits as well. *See Southern Cal. Chapter of Assoc. Builders and Contractors, Inc. v. Cal. Apprenticeship Council,* 4 Cal. 4th 422, 428-29, 432-35 (1992) (explaining how California's apprenticeship regulations work). Participation in the regulatory scheme is entirely voluntarily, however. California does not prohibit apprenticeship training programs from operating without state approval, and employers are not required to hire apprentices from state-approved programs or indeed to hire any apprentices at all.

For building contractors, a major benefit of hiring registered apprentices is that they can pay them a special rate for work that they perform on public construction projects. Cal. Lab. Code § 1777.5. This rate is typically lower than the journeyman rate, which is otherwise the required minimum for such projects under California's prevailing wage law. Cal. Lab. Code § 1771.[1] The special apprenticeship rate is set pursuant to 8 Cal. Code Regs. § 208(b), which is one of the two provisions of the California apprenticeship regulations that Associated Builders claims is preempted.

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[1] Similar to California's prevailing wage law, the federal Davis-Bacon Act allows public contractors on federal public works to pay apprentices who are enrolled in programs that meet standards promulgated under the Fitzgerald Act less than the prevailing journeyman wage. 40 U.S.C. § 276(a). *See Dillingham I,* 519 U.S. at 319-20 (noting this similarity).

The other provision that Associated Builders challenges is 8 Cal. Code Regs. § 208(c), which establishes the rates that contractors are to pay to registered apprentices on private construction projects. Whereas the 2002 amendments did not substantially modify § 208(b), they recalibrated the wage requirements for registered apprentices on private construction jobs that are set forth in § 208(c) in order to reflect the varied market conditions throughout California. Under § 208(c), as amended, a building construction contractor has two alternatives if it employs registered apprentices on private construction jobs. The first alternative is to pay registered apprentices a state-defined percentage of the prevailing per diem compensation package[2] for journeymen in the relevant craft and geographical area. This percentage progressively increases from 40 to 80 percent over the period of an apprentice's training program. 8 Cal. Code Regs. §§ 208(c)(1)-(5).[3] The second alternative is for a contractor to provide the same compensation package to registered apprentices on private projects that it pays for public work jobs in the same craft and locality. 8 Cal. Code Regs. § 208(c)(6). Like the rest of California's apprenticeship

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[2] For both public and private projects, apprentices' compensation packages may incorporate wages and benefits, 8 Cal. Code Regs. §§ 208, 16000.

[3] If the state has not yet determined a prevailing hourly compensation package and progression schedule in a particular craft or location, the regulation requires "a starting wage rate decided by the sponsoring program in consultation with and subject to the approval of the Chief [of the Division of Apprenticeship Standards] based on consideration of the minimum starting hourly wage package and wage package progression for apprentices in the most analogous occupations and geographic areas." 8 Cal. Code Regs. § 208(c)(2).

regulatory scheme, § 208(c) is entirely voluntary. It does not impose any obligations on contractors who do not employ apprentices from state-approved apprenticeship programs.

Two types of apprenticeship programs can qualify for state approval. Joint apprenticeship programs are collaborative ventures between unions and employers. Unilateral programs are run by employers with no union involvement. Cal. Lab. Code § 3075; 8 Cal. Code Regs. §§ 205(g), 206(a)-(b). At the time this lawsuit was filed, there were 28 state-approved unilateral apprenticeship programs, enrolling approximately 5,400 apprentices. Associated Builders sponsors three of these programs, which collectively enroll fewer than 600 apprentices.

Joint apprenticeship programs train a larger proportion of California's registered apprentices. At present, there are 195 active state-approved joint apprenticeship programs in the building and construction trades, enrolling over 43,500 apprentices. Among the sponsors are the California State Pipe Trades Joint Apprenticeship Committee and the Plumbers and Steamfitters Local 159 Joint Apprenticeship and Training Committee, the amici curiae who urge affirmance of the district court's ruling. The majority of unionized apprentices in state-approved programs are represented by the unions affiliated with the State Building and Construction Trades Council of California, AFL-CIO, whose motion to intervene as a defendant was granted by the district court.

II. ANALYSIS

By entering a final judgment pursuant to Fed. R. Civ. P. 65(a)(2), the district court consolidated its preliminary

injunction ruling with its decision on the merits. In such cases, we review the district court's factual findings for clear error and its conclusions of law *de novo*. *Freeman v. Allstate Life Ins. Co.*, 253 F.3d 533, 536 (9th Cir. 2001); *Barden Detroit Casino v. City of Detroit*, 230 F.3d 848, 853 (6th Cir. 2000).

A. ERISA Preemption

According to its express preemption clause, ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan. . . . " 29 U.S.C. § 1144(a). This preemption clause ensures that plans and their sponsors minimize the administrative and financial burdens of complying with conflicting laws among states or between states and the federal government. The phrase "relates to" in the ERISA preemption clause has been interpreted by the Supreme Court as encompassing state laws that either have (1) a "reference to" or (2) a "connection with" employment benefit plans covered by this statute. *Dillingham I*, 519 U.S. at 324.

The "reference to" prong applies where the state law in question either acts "immediately and exclusively" upon an ERISA plan or the existence of such a plan is "essential" to the law's operation. *Dillingham I*, 519 U.S. at 325; *Abraham v. Norcal Waste Systems, Inc.*, 265 F.3d 811, 820 (9th Cir. 2001). Under the second prong, a state law has a "forbidden connection" with ERISA plans if it falls outside the scope of state laws that Congress understood would survive ERISA or if its effect is to bind ERISA plans. *Dillingham I*, 519 U.S. at 325; *New York State Conference*

of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 656-59 (1995).

The outcome of our ERISA preemption analysis is controlled by *Dillingham I,* in which the Supreme Court rejected an ERISA preemption challenge to Cal. Lab. Code § 1777.5, the California statutory provision that permits contractors to pay registered apprentices a special rate for work on public construction projects. 519 U.S. 316. The Supreme Court held that § 1777.5 did not run afoul of the "reference to" prong of ERISA preemption analysis because apprenticeship programs "need not necessarily be ERISA plans." *Dillingham I,* 519 U.S. at 325. Rather, § 1777.5 "functions irrespective of . . . the existence of an ERISA plan" and is indifferent "to the funding, and attendant ERISA coverage, of apprenticeship programs." *Id.* at 328 (internal citations and quotations omitted).

Section 208, the regulation that Associated Builders challenges, implements the objectives established in Cal. Lab. Code § 1777.5 and other state legislation. In § 208, as amended, there is no specific provision that makes ERISA plans essential to its operation or that acts immediately or exclusively upon ERISA plans. Thus, § 208, like § 1777.5, survives Associated Builders' challenge under this "reference to" prong of ERISA preemption analysis.

Under the "connection with" prong of ERISA preemption analysis, Associated Builders' challenge to § 208 also fails for the reasons set forth in *Dillingham I.* Congress did not intend ERISA to preempt regulation in areas of traditional state concern, such as the regulation of apprenticeship standards, that are "quite remote from the areas with which ERISA is expressly concerned – reporting, disclosure, fiduciary responsibility and the like." *Dillingham I,* 519

U.S. at 330 (internal quotations and citations omitted). As the Supreme Court concluded in *Dillingham I:*

> Given the paucity of indication in ERISA and its legislative history of any intent on the part of Congress to pre-empt state apprenticeship training standards, or state prevailing wage laws that incorporate them, we are reluctant to alter our ordinary assumption that the historic police powers of the States were not to be superseded by the Federal Act.

Id. at 331 (internal quotations and citations omitted).

Associated Builders argues that § 208(c) should be treated differently from the portion of California's apprenticeship regulatory scheme upheld in *Dillingham I* because it establishes standards for compensating apprentices employed on private works while § 1777.5 governs public works. Associated Builders acknowledges that regulating apprenticeship standards on public works is an exercise of traditional state power, but it argues that the state's establishment of comparable guidelines for private projects is not. This argument has little merit, however, for California has long regulated apprenticeship standards without regard to whether apprentices work for public or private employers.

Even if setting apprenticeship standards for private works were not an area of traditional state concern, Congress mandates that ERISA not be "construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States . . . or any rule or regulation issued under any such law." 29 U.S.C. § 1144(d). To hold that ERISA preempts California's apprenticeship regulations would violate this mandate, for when Congress passed the

Fitzgerald Act, it "recognized pre-existing state efforts in regulating apprenticeship programs and apparently expected that those efforts would continue." *Dillingham I,* 519 U.S at 330.

The other reason why California's apprenticeship regulatory scheme does not have a "forbidden connection" is that it "does not bind ERISA plans to anything." *Id.* at 332. At most, California's regulatory scheme "alters the incentives, but does not dictate the choices, facing ERISA plans." *Id.* at 334. If the indirect economic effect of such incentives were sufficient to trigger ERISA preemption, there would be no effective constraints on "ERISA's preemptive reach, and the words 'relate to' would limit nothing." *Id.* at 329; *see also Travelers,* 514 U.S. at 660-61.

In determining that the California regulatory scheme does not dictate the choices facing ERISA plans, we reject Associated Builders' attempt to compare it to the Minnesota requirements governing sprinkler contractors that the Eighth Circuit held to be preempted by ERISA. *Minnesota Chapter of Associated Builders and Contractors, Inc. v. Minnesota Dept. of Public Safety,* 267 F.3d 807 (8th Cir. 2001) ("*Minnesota ABC*"). The Eighth Circuit determined that Minnesota's requirement that all sprinkler contractors register all of their apprentices in a state-approved training program "does more than simply provide a powerful economic incentive, it prevents the use of apprentices who are not registered in approved programs." *Id.* at 815. In so holding, the Eighth Circuit explicitly distinguished Minnesota's requirements from the California apprenticeship standards upheld in *Dillingham I. Id.*

Unlike the provisions preempted in *Minnesota ABC*, § 208 does not require that contractors maintain state-approved apprenticeship programs or that they hire registered apprentices in most circumstances. Rather, California provides minimum standards for those apprenticeship programs that voluntarily seek state approval.[4] Since § 208 does not compel an apprenticeship program to comply with California's apprenticeship standards, Associated Builders' reliance on *Minnesota ABC* is misplaced. Moreover, the 2002 amendments to § 208 present even less of a concern about compulsion than the provision challenged in *Dillingham I* because they reduce the incentive to seek state approval by increasing the wage rates for registered apprentices on private construction jobs.

Associated Builders also argues that California's minimum apprentice rates impermissibly affect ERISA plans because they can be satisfied by a mixture of wages and benefits. In *WSB Elec., Inc. v. Curry,* 88 F.3d 788, 793 (9th Cir. 1996), we rejected an ERISA preemption challenge to California's prevailing wage law based on our analysis that the state regulation did not dictate terms; rather it only required that "regardless of how [employers]

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[4] Associated Builders maintains that California's regulatory scheme compels contractors to employ registered apprentices on public works. This is contrary to the interpretation of § 1777.5 in *Dillingham I,* which construed California's regulatory scheme to permit two options in most circumstances – either contractors hire registered apprentices and pay them the special apprenticeship rate or they hire whomever they wish and pay the prevailing journeyman wage. *See Dillingham I,* 519 U.S. at 320, 332; *see also* 8 Cal. Code Reg. § 230.1(a). We assume that the Supreme Court's description in *Dillingham I* is accurate because nothing in the record indicates any pertinent changes in the interim.

write their ERISA plans, or even whether they have ERISA plans at all, they must pay the prevailing wage, and they may do so through some combination of cash and benefits." *Id.* at 796. Here, there is even less of a concern about compulsion than there was in *WSB* because § 208 is not mandatory.

In sum, we conclude that ERISA does not preempt § 208 for the following reasons: these provisions do not act immediately or exclusively upon ERISA plans; apprenticeship standards are a traditional area of state concern; Congress has explicitly encouraged continued state regulation of apprenticeship standards; and California does not compel contractors or apprenticeship training programs to participate in its incentive-based regulatory scheme.

B. NLRA Preemption

In contrast to its ERISA challenge, Associated Builders directs its NLRA preemption challenge only to § 208(c) of the California regulations, which governs apprenticeships on private projects. This is a wise strategy since any challenge to California's minimum standards for apprentices on public works would unquestionably be precluded by *Dillingham II,* 190 F.3d 1034. In *Dillingham II*, we expressly held that § 1777.5, the California statutory provision regulating apprenticeship standards on public works, was not preempted by the NLRA just as the Supreme Court, in *Dillingham I,* 519 U.S. 316, held that it was not preempted by ERISA. Here, we conclude that for similar reasons the NLRA does not preempt the regulations with respect to work on private projects.

As a threshold issue, Associated Builders attempts to distinguish *Dillingham II* by arguing that it merely

reasserted the basic principle that NLRA preemption does not apply when the state acts as either a proprietor or a market participant. *Building & Constr. Trades Council v. Associated Builders & Contractors, Inc.*, 507 U.S. 218, 227 (1993); *Babler Bros., Inc. v. Roberts,* 995 F.2d 911, 916 (9th Cir. 1993); *Rondout Elec., Inc. v. New York State Dep't of Labor,* 335 F.3d 162, 167 (2d Cir. 2003). Associated Builders misreads *Dillingham II.* There, we expressly rejected California's claim that it acted pursuant to its proprietary powers when it established apprenticeship standards for public works. Because our holding in *Dillingham II* turned on our determination that California's enactment of § 1777.5 constituted a regulatory not a proprietary action, the fact that the provision only dealt with public works was not material to our analysis. 190 F.3d at 1037-38. Therefore, *Dillingham II* cannot be distinguished on the ground that it applied to public as opposed to private projects.

Although the NLRA has no express preemption clause, the Supreme Court has nevertheless articulated two NLRA preemption principles. First, *Garmon* preemption prohibits states from regulating fields that Congress intended to occupy fully through the creation of a continuum between conduct that is either protected or prohibited by the NLRA. *San Diego Bldg. Trades Council v. Garmon,* 359 U.S. 236, 244 (1959). The purpose of *Garmon* preemption is "to preclude state interference with the National Labor Relations Board's interpretation and active enforcement of the 'integrated scheme of regulation' established by the NLRA." *Golden State Transit Corp. v. City of Los Angeles,* 475 U.S. 608, 613 (1986) (quoting *Wisconsin Dep't of Indus. v. Gould, Inc.,* 475 U.S. 282, 289 (1986)).

See also Michael H. Gottesman, Rethinking Labor Law Preemption, 7 YALE J. ON REG. 355 (1990).

Second, *Machinists* preemption prohibits states from imposing restrictions on labor and management's "weapon[s] of self-help" that were left unregulated in the NLRA because Congress intended for tactical bargaining decisions and conduct "to be controlled by the free play of economic forces." *Lodge 76, Int'l Assoc. of Machinists & Aerospace Workers v. Wisconsin Employment Relations Comm'n,* 427 U.S. 132, 140, 146 (1976). Associated Builders raises challenges to § 208(c) under both the *Garmon* and *Machinists* doctrines of NLRA preemption.

Associated Builder's primary *Garmon* argument is that § 208(c) impermissibly inserts the state into the bargaining process, thus interfering with the federally protected rights of workers to designate their own collective bargaining representatives. In *Dillingham II,* we rejected this argument because we determined that California's apprenticeship regulatory scheme "does not affect the right to bargain collectively." 190 F.3d at 1041.

Like the plaintiff in *Dillingham II,* Associated Builders relies for its NLRA preemption analysis on *Bechtel Construction v. United Brotherhood of Carpenters & Joiners of America,* 812 F.2d 1220 (9th Cir. 1987). At issue in *Bechtel* was the California Division of Apprenticeship Standards' interpretation of 8 Cal. Code Regs. § 212(c), which allowed a contractor and a union to negotiate a collective bargaining agreement with a wage rate that was lower than the state's apprenticeship standard provided they obtained approval from the Division of Apprenticeship Standards before the new rate went into effect. *Bechtel,* 812 F.3d at 1222-24. The requirement of state

approval caused the *Bechtel* court to conclude that § 212(c) effectively gave apprentices two bargaining representatives – the state and their union – in violation of the NLRA. *Id.* at 1224-25. In contrast, neither § 1777.5, the provision upheld in *Dillingham II,* nor § 208(c) requires California officials to approve collective bargaining wage rates before they go into effect. Both merely prohibit contractors, whether union or non-union, from paying registered apprentices below the apprenticeship minimum standards. The regulation is thus no more preempted than are state minimum wage laws generally.

Associated Builders' other *Garmon* preemption argument is that § 208(c) will force employers to renegotiate their collective bargaining agreements. According to Associated Builders, journeymen and apprentice wage rates are typically "directly related," and thus, by increasing wages for apprentices, § 208(c) will pressure contractors to renegotiate journeymen wages.[5] Although the *Bechtel* court discussed the effect that the regulations at issue might have on compensation rates generally, its holding turned on the fact that the state impermissibly interfered with the collective bargaining process, by becoming a participant. *Bechtel,* 812 F.2d at 1226; *see also Dillingham II,* 190 F.3d at 1040 (discussing *Bechtel*). No such state involvement occurs under § 208(c). Moreover, no

[5] Regardless of its legal merit, this contention is not supported by the record. Even after the adoption of the 2002 amendments, 85 percent of state-approved apprenticeship programs, enrolling about 90 percent of all registered apprentices, already paid apprentices at a rate that is equal to or higher than the state minimum. Accordingly, it is unlikely that the regulation will force widespread renegotiation of contracts in order to conform with the amendments.

state minimum wage statute would survive an NLRA preemption challenge if preemption would result whenever regulations setting the minimum wages of the lowest-paid workers might have the indirect effect of increasing the wages of workers in higher-paid classifications.

Associated Builders' other arguments apply the *Machinists* doctrine of NLRA preemption. In *Dillingham II,* we held that California's apprenticeship standards survived a *Machinists* challenge for two reasons – both of which are controlling here as well. First, the establishment of wage and benefit minimums for apprentices is not a policy area that Congress intended to leave unregulated. *Dillingham II,* 190 F.3d at 1038-39. Just two years after Congress passed the NLRA, it specifically established a federal-state partnership to regulate apprenticeship standards in the Fitzgerald Act. It would not have directed the Secretary of Labor "to cooperate with State agencies engaged in the formulation and promotion of standards of apprenticeship," 29 U.S.C. § 50, if it had intended the NLRA to supplant the states' historic role in protecting apprentices.

Second, the regulations establish minimum labor standards for registered apprentices. 190 F.3d at 1039. Numerous state minimum labor standards have survived NLRA preemption challenges:

> there is no suggestion in the legislative history of the Act that Congress intended to disturb the myriad state laws then in existence that set minimum labor standards, but were unrelated in any way to the processes of bargaining or self-organization. . . . States possess broad authority under their police powers to regulate the employment relationship to protect workers within

> the State. . . . [M]inimum and other wage laws . . . are only a few examples.

Metropolitan Life Insurance Co. v. Massachusetts Travelers Insurance Co., 471 U.S. 724, 756 (1985) (internal citations omitted); *accord Fort Halifax Packing Co., Inc. v. Coyne*, 482 U.S. 1, 21 (1987) ("Both employers and employees come to the bargaining table with rights under state law that form a backdrop for their negotiations." (internal quotations omitted)). Relying on these decisions, we have declared that "state minimum benefit protections have repeatedly survived *Machinists* preemption challenges." *National Broadcasting Co. v. Bradshaw*, 70 F.3d 69, 71 (9th Cir. 1995).

Specifically, the NLRA does not preempt state regulations that establish minimum wages, benefits, or other "[m]inimum state labor standards [that] affect union and non-union employees equally, and neither encourage nor discourage the collective-bargaining processes that are the subject of the NLRA." *Metropolitan Life*, 471 U.S. at 755. As we held in *Dillingham II*, California's apprenticeship regulatory scheme for public works does not encourage or discourage registered apprentices from exercising their NLRA-protected rights to organize and bargain collectively because it does not preclude efforts to negotiate or exert economic leverage to set a level of compensation above its minimum standards. 190 F.3d at 1040. California's apprenticeship standards target a vulnerable group of entry-level workers, establish a minimum wage package for their services (if they register with state-approved programs), and ensure that training and education are available so they can progress towards better paying and higher status jobs.

Attempting to distinguish *Dillingham II,* Associated Builders argues that § 208(c) does not meet the Supreme Court's requirement that minimum labor standards "affect union and non-union employees equally." *Metropolitan Life,* 471 U.S. at 755; *Fort Halifax,* 482 U.S. at 22; *Livadas v. Bradshaw,* 512 U.S. 107, 132 n. 26 (1994). The case before us raises a facial challenge. On its face, § 208(c) does not treat union and non-union employees differently. Rather, it affords every contractor the opportunity to establish a state-approved apprenticeship program and to hire registered apprentices, regardless of whether it has a collective bargaining agreement with a union.

Nonetheless, Associated Builders attempts to argue that, in practice, the regulatory scheme creates advantages for unionized employees because it allows their unions and employers to alter the state's wage packages. According to Associated Builders, unions and union employers can negotiate a lower or higher rate in their collective-bargaining agreements, which the Director of Industrial Relations will invariably adopt as the prevailing rate. Thus, Associated Builders asserts, union contractors can manipulate the state standards while non-union contractors are bound by wage packages that are effectively set by their union competitors.

Associated Builders' argument, in essence, is that California's process for setting the prevailing wage is unlawful under the NLRA because it allows unions and union employers, rather than the state, to determine the state-prescribed wage. This, however, is not an accurate characterization of how California determines the prevailing rate. California's Director of Industrial Relations is not permitted simply to accept a rate identified in a collective bargaining agreement as the prevailing rate. The Director

must determine, first, whether a rate is "actually prevailing." Cal. Lab. Code § 1773; *International Brotherhood of Electrical Workers v. Aubry,* 41 Cal. App. 4th 1632, 1636-39 (1996); *Independent Roofing Contractors v. Dep't of Indus. Relations,* 23 Cal. App. 4th 345, 355 (1994). He does so by determining the rate actually paid to a majority of workers in the craft and locality. "If no single rate is being paid to a majority of the workers, then the single rate being paid to the greatest number of workers, or modal rate, is prevailing." Cal. Lab. Code § 1773.9.[6] A large non-union employer who pays all workers in a particular craft and location the same wage is just as likely to exert influence over the modal rate as a large union that negotiates a contract governing employment on numerous construction jobs. The determinative factor is the number of employees that a rate covers, not whether the employees are unionized.

Associated Builders' final *Machinists* argument stems from our holding in *Chamber of Commerce v. Bragdon,* 64 F.3d 497, 504 (9th Cir. 1995) that Contra Costa County's prevailing wage ordinance was preempted. Although in *Metropolitan Life*, the Supreme Court determined that "[t]he NLRA is concerned primarily with establishing an equitable process for determining terms and conditions of employment, and not with particular substantive terms of the bargain that is struck when the parties are negotiating from relatively equal positions," 471 U.S. at 753, *Bragdon* held that state substantive labor standards can

[6] If a modal rate cannot be determined, the Director of Industrial Relations establishes a rate by considering further data from labor unions, employers, and employers associations, as well as rates on federal projects in the nearest labor market area and wage surveys. *Id.*

be preempted in certain extreme situations, when they are "so restrictive as to virtually dictate the results" of collective bargaining. 64 F.3d at 501. Associated Builders argues that § 208(c) is as restrictive as the Contra Costa County ordinance. We disagree.

Bragdon must be interpreted in the context of Supreme Court authority and our other, more recent, rulings on NLRA preemption. While *Bragdon* emphasized that the Contra Costa County ordinance "targets particular workers in a particular industry," *id.* at 504, we have since explained on several occasions that the NLRA does not authorize us to pre-empt minimum labor standards simply because they are applicable only to particular workers in a particular industry. *Dillingham II,* 190 F.3d at 1034 (upholding minimum standards that applied only to apprentices in the skilled trades); *National Broadcasting,* 70 F.3d at 71-73 (holding that a California regulation that applied only to broadcast employees was not preempted); *Viceroy Gold Corp. v. Aubry,* 75 F.3d 482 (9th Cir. 1996) (holding that a regulation that applied only to miners was not preempted). It is now clear in this Circuit that state substantive labor standards, including minimum wages, are not invalid simply because they apply to particular trades, professions, or job classifications rather than to the entire labor market.

Bragdon also emphasized that Contra Costa County established its prevailing wage rates under its regulatory, rather than its proprietary, authority. 64 F.3d at 501-02.[7]

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[7] *Bragdon* recognized that when a public entity sets prevailing wage rates on public projects pursuant to its authority as a market

(Continued on following page)

Although *Dillingham II* also dealt with prevailing wage rates established by a public entity pursuant to its regulatory authority, there are two salient distinctions between the regulations invalidated in *Bragdon* and those upheld in *Dillingham II*. The distinctions are controlling here.

First, as discussed above, Congress authorized states to establish apprenticeship standards and to regulate the conditions governing the implementation of apprenticeship programs, whether the apprentices were working on public or private projects. This long-standing federal-state partnership, which was recognized in *Dillingham I* and *Dillingham II*, differentiates California's apprenticeship regulations from the Contra Costa County ordinance at issue in *Bragdon*.

Second, and equally important, unlike in the case of the Contra Costa County ordinance at issue in *Bragdon*, here contractors may completely avoid the applicability of the California apprenticeship regulations. California contractors are, for example, under no obligation to hire apprentices from state-approved programs for private construction projects or for public projects in most circumstances. The Contra Costa scheme, in contrast, was applicable to all workers on private construction projects, and the employers were mandated to pay them all the prevailing wage rates.[8] In short, § 208(c), like the apprenticeship

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participant or as a proprietor, NLRA preemption analysis does not apply. *Id.*

[8] In invalidating Contra Costa County's *prevailing* wage ordinance, we carefully distinguished, for purposes of preemption, state-established *minimum* wage regulations, which we acknowledged to be lawful. *Bragdon*, 64 F.3d at 502.

regulations for public works that were upheld in *Dillingham II*, is not so restrictive as to interfere with the collective-bargaining process.[9]

In sum, we conclude that § 208(c) is not preempted by the NLRA.

III. Conclusion

For the foregoing reasons, we hold that California's apprenticeship regulations are not preempted by either ERISA or the NLRA. The judgment of the district court is

AFFIRMED.

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[9] Associated Builders also argues that § 208(c) is supported by tenuous reasons. Although the *Bragdon* court questioned whether the county articulated public purposes that were sufficient to justify its ordinance, it nevertheless "proceed[ed] under the assumption" that it was within its legitimate police powers. 64 F.3d at 503. This result is consistent with the Supreme Court's mandate that "[i]n labor preemption cases, as in others under the Supremacy Clause, our office is not to pass on the reasonableness of state policy." *Livadas*, 512 U.S. at 120.

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SANTA ANA, CALIFORNIA

ASSOCIATED BUILDERS AND CONTRACTORS OF SOUTHERN CALIFORNIA, INC., Plaintiff, vs. HENRY P. NUNN, III, et al., Defendants.	Case No. [CV] SA02-131AHS (MLGx) **STIPULATION AND ORDER FOR ENTRY OF FINAL JUDGMENT** **NOTE CHANGES MADE BY THE COURT.** (Filed Jun. 17, 2002)

Whereas Plaintiff Associated Builders and Contractors of Southern California, Inc. filed its First Amended Complaint in this action on February 11, 2002, and Defendants Henry P. Nunn III, Stephen J. Smith, and Jeannie Holmes and Intervenor-Defendant State Building and

Construction Trades Council of California, AFL-CIO ("SBTC") (hereafter collectively referred to as "Defendants") have appeared in this action through their respective attorneys;

Whereas ABC-SoCal's First Amended Complaint sought a declaration that the provisions of Section 208(b) and/or Section 208(c) of Title 8 of the California Code of Regulations are preempted by the United States Housing Act (42 U.S.C. § 1437 et seq.) ("USHA"); Davis Bacon Act (40 U.S.C. §§ 276a); National Labor Relations Act (29 U.S.C. §§ 157 et seq.) ("NLRA"); and/or Employee Retirement Income Security Act (29 U.S.C. §§ 1001 et seq.) ("ERISA") and are unconstitutional as a violation of the Supremacy Clause contained in Article VI of the Constitution of the United States; and a temporary restraining order, preliminary and permanent injunction enjoining Defendants and their agents, employees, attorneys, representatives, as well as all those persons acting in active concert or participation with them, from placing or continuing in effect, or applying, enforcing, or threatening to apply or enforce Section 208(b) and Section 208(c) against ABC-SoCal, its subscribing employers, or any employer of apprentices in the building and construction industry in the State of California or to ABC-SoCal's apprentices, or any other person, entity, or apprenticeship program, or apprentice;

Whereas ABC-SoCal filed a motion for a preliminary injunction and Defendants opposed such motion;

Whereas, following the submission of briefs and evidence by the parties and amicus curiae and oral argument, on April 11, 2002, the Honorable Alicemarie H.

Stotler of the United States District Court issued an order denying ABC-SoCal's Motion for Preliminary Injunction;

Whereas the issue at trial of whether Section 208 of Title 8 of the California Code of Regulations is preempted by the USHA, the Davis Bacon Act, the NLRA, and/or the ERISA is identical to the issues set forth in ABC-SoCal and Defendants' motion for preliminary injunction or opposition thereto;

Whereas the parties wish to preserve scarce resources and to obtain a final judgment of all causes of action before the district court so that they may present their claims to the Court of Appeals; and

Whereas on May 9, 2002, ABC-SoCal filed a Notice of Appeal to appeal the district court's April 11, 2002 Order Denying Preliminary Injunction, but the parties now wish to obtain a final judgment and ABC-SoCal wishes to file an appeal of the final judgment.

ABC-SOCAL AND DEFENDANTS, BY AND THROUGH THEIR ATTORNEYS, NOW STIPULATE AND AGREE AS FOLLOWS:

Pursuant to FRCP 65(a)(2), the Court may order the trial of the action on the merits to be consolidated with the hearing of the application for a preliminary injunction. The Court may enter judgment as to ABC-SoCal's First Amended Complaint against ABC-SoCal and in favor of Defendants. The Court may adopt its findings of fact and conclusions of law in its April 11, 2002 Order Denying Preliminary Injunction, as appropriately modified, as the final findings of fact and conclusions of law in this matter. To the extent that any of the Findings of Fact are deemed to be Conclusions of Law or any of the Conclusions of Law

are deemed to be Findings of Fact, the same shall be deemed to be Conclusions of Law or Findings of Fact, as the case may be.

FINDINGS OF FACT

1. Plaintiff, a California corporation, is an association of contractors engaged in the building and construction trades with its principal place of business in Anaheim, California. See First Amended Complaint ¶ 3. Plaintiff sponsors State-approved apprenticeship programs in the occupations of electrician, plumber, and carpenter. See Decl. Sawyer ¶ 6.

2. Defendant Nunn is Chief, Division of Apprenticeship Standards ("DAS") of the State of California. See Decl. Nunn ¶ 1.

3. Defendant Smith is Director of the Department of Industrial Relations ("DIR") of the State of California. See First Amended Complaint ¶ 7a.

4. Defendant Holmes is Chair of the California Apprenticeship Council ("CAC"). See First Amended Complaint ¶ 8a.

5. Defendant-Intervenor SBTC is a federation of unions that collectively represent most of the apprentices in State-approved apprenticeship programs in California. Reply Decl. Balgenorth ¶¶ 1, 6, 7.

6. CAC is a seventeen-member body comprised of representatives of business, labor, government, education, and the general public. Cal. Labor Code Section 3070. The CAC amended its regulations, effective February 16, 2002, and those amended regulations are challenged in this

case. The Court is informed that an accurate copy of the amended regulations is attached as Exhibit A to the First Amended Complaint.

7. The regulation at issue in this case is Title 8, California Code of Regulations, Section 208 (hereinafter "Section 208"), and specifically Sections 208(b) and (c).

8. Sections 208(b) and (c) set out the minimum wage scale that an apprenticeship program must meet in order to receive State approval.

9. There is no requirement that an apprenticeship program must receive or maintain State approval to operate in California. Nor is there any prohibition on contractors employing apprentices from unapproved programs.

10. California is approved by the Secretary of Labor as a State Apprenticeship Council ("SAC") under the National Apprenticeship Act, 29 U.S.C. §50. Therefore, State approval of an apprenticeship program also confers approval upon the program for federal purposes.

11. Section 208(b) addresses the wage scale for apprentices in the building and construction trades when they are employed on public works projects. Section 208(c) addresses the wage scale for apprentices in the building and construction trades when they are employed on projects "not covered by [Section 208(b)]."

12. Plaintiff contends that: (1) Sections 208(b) and (c) are preempted by the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §1001, *et seq.*; (ii) Section 208(c) is preempted by the National Labor Relations Act ("NLRA"), 29 U.S.C. §151, *et seq.*; (iii) Section 208(c) is preempted by the Davis-Bacon Act, 40

U.S.C. §276a, *et seq.*, insofar as it applies state wage rates to projects awarded by federal agencies, and (iv) Section 208(c) is preempted by administrative regulations adopted by the Department of Housing and Urban Development ("HUD") pursuant to the United States Housing Act, 42 U.S.C. §1437, *et seq.* insofar as Section 208(c) would require that State wage rates higher than the applicable federal wage rates be paid on certain HUD-funded projects covered by these administrative regulations.

13. Defendants do not interpret Section 208(c) as applicable to projects awarded by federal agencies. They regard these projects to be covered by Section 208(b), which was not substantively amended. Defendants represent that, as a matter of policy, they do not enforce state wage rates on projects awarded and controlled by federal agencies, and plaintiff does not make any showing to the contrary.

14. Defendants do not interpret Section 208(c) as applicable to projects covered by the HUD regulations that plaintiff relies upon. They regard these projects to be covered by Section 208(b), which has not been substantively amended. The California Director of DIR, Defendant Smith, has a policy of adopting the federal wage rates for projects covered by the HUD regulations so as to avoid a possible conflict with federal law. Defendants do not enforce higher State wage rates on projects covered by the HUD regulations.

CONCLUSIONS OF LAW

1. Plaintiff asserts that the Court has jurisdiction under 28 U.S.C. §1331. The Court questions whether a federal question is presented, but, because jurisdiction and

the merits are intertwined, the Court has proceeded to adjudicate the case on the merits. *See Panchita Hodgers-Durgin, et al. v. Gustavo De La Vina, et al.* 199 F.3d 1037, 1042 n.3 (1999).

2. Venue is proper in this district.

3. There is no case or controversy before the Court with regard to HUD regulations. Because Defendants do not enforce, and do not intend to enforce, higher State wage rates on projects covered by the HUD regulations, the question whether higher State wage rates would be preempted by the HUD regulations is hypothetical.

4. There is no case or controversy before the Court regarding Davis-Bacon preemption. As a general matter, the Davis-Bacon Act is intended to benefit employees by setting a floor on the wages that may be paid to employees on federal construction projects. *See United States v. Binghamton Construction Company, Inc.*, 347 U.S. 171, 178, 74 S.Ct. 438, 442, 98 L.Ed. 594 rehearing denied, 347 U.S. 940, 74 S.Ct. 625, 98 L.Ed. 1089 (1954). In this case, Defendants do not interpret Section 208 to apply State wage rates, rather than Davis-Bacon wage rates, on projects that are funded and controlled by federal agencies. *See* 8 C.C.R. §16001(b); *Southern California Labor Management Operating Engineers Contract Compliance Committee v. Aubry*, 54 Cal.App.4th 873, 883, 63 Cal.Rptr.2d 106, 111-12 (1997). Accordingly, the question whether the State could require higher wage rates than the federal rates for apprentices on those exclusively federal projects is hypothetical.

5. Section 208(c) is not preempted by the NLRA. Congress intended the States to establish labor standards, including wage standards, for apprentices. *See Dillingham*

Construction v. County of Sonoma, 190 F.3d 1034 (9th Cir, 1999). The NLRA preemption case that plaintiff principally relies upon, *Chamber of Commerce of the U.S. v. Bragdon*, 64 F.3d 497 (9th Cir. 1995), did not deal with a wage scale for apprentices; moreover, the wage scale was mandatory, not applicable only to workers in apprenticeship programs that have voluntarily sought state approval.

6. Sections 208(b) and (c) are not preempted by ERISA. Congress did not intend ERISA to preempt state regulation of apprenticeship standards for those programs that voluntarily seek State approval. *See Calif. Div. of Labor Standards Enf. v. Dillingham*, 519 U.S. 316, 332, 117 S.Ct. 832, 841, 136 L.Ed. 2d 791 (1997). Moreover, ERISA does not prevent the State from granting a credit toward the wage requirement for fringe benefit payments. *See WSB Electric Inc. v. Curry*, 88 F.3d 288 (9th Cir. 1996). Plaintiff also objects to that provision of Section 208(c) that allows the state to verify payment of contributions on the ground that it places undue burdens on ERISA plans. However, the provision on its face applies to employers, not to ERISA plans. Whether the state would enforce the provision in a manner that interfered with the operations of ERISA plans is speculation.

ABC-SoCal and Defendants ask that the Court approve this stipulation and enter the attached judgment. ABC-SoCal preserves its right to appeal on all of the contentions raised in its requests for declaratory and injunctive relief. This stipulation and judgment shall not constitute evidence or an admission by any party. Each party shall bear its own costs and fees.

IT IS SO STIPULATED.

COOK BROWN, LLP

Date: June 12, 2002 /s/ Jessavel Wong
DENNIS B. COOK
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JESSAVEL DELUMEN WONG
Attorney for Plaintiff
ASSOCIATED BUILDERS AND CONTRACTORS OF SOUTHERN CALIFORNIA, INC.

DEPARTMENT OF INDUSTRIAL RELATIONS, OFFICE OF THE DIRECTOR – LEGAL UNIT

Date: June 10, 2002 /s/ John M. Rea
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DEPARTMENT OF INDUSTRIAL RELATIONS, OFFICE OF THE DIRECTOR – LEGAL UNIT

Date: June 10, 2002 /s/ Fred D. Lonsdale
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Date: June 12, 2002 /s/ Julian O. Standen
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ALTSHULER, BERZON,
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Date: June 7, 2002 /s/ Jonathan Weissglass
STEPHEN P. BERZON
SCOTT A. KRONLAND
JONATHAN WEISSGLASS
Attorney for Intervenor
Defendant State Building and
Construction Trades Council
of California, AFL-CIO

[/s/ AHS It is ordered that the clerk enter judgment in favor of defendants.]

IT IS SO ORDERED

JUN. 17, 2002

/s/ Alicemarie H. Stotler
United States District Judge

Title 8, California Code of Regulations, Section 208(b):

(b) For Apprentices In The Building And Construction Industry Employed On Public Works Projects: For apprentices participating in approved apprenticeship programs in the building and construction industry, the wages and employer payments for employees benefits as defined in 8 C.C.R. §16000 for regular and overtime work while employed on public works projects within the meaning of Labor Code §1720 et seq. shall be the per diem wage rates for apprentices in the apprenticeable occupation as determined by the Director of Industrial Relations in the geographic area of the project.

Title 8, California Code of Regulations, Section 208(c):

(c) For Apprentices In The Building And Construction Industry Employed On Projects Not Covered By Subsection (b), Above: The hourly wage package as used herein consists of the total of the wages and employer payments for employee benefits as defined in 8 C.C.R. §16000. For apprentices participating in approved apprenticeship programs in the building and construction industry, the minimum hourly wage package for apprentices while employed on projects not covered by Subsection (b) above shall be as set forth either in subsections (1)-(5) of this subsection or, in the alternative, as set forth in subsection (6) of this subsection:

(1) A starting hourly wage package for first-period apprentices of not less than 40 percent of the prevailing per diem wage package for journeymen in the apprenticeable occupation and geographic area of the project, as determined by the Director of Industrial Relations for purposes of Labor Code §1720 et seq., using the rate effective on the immediately preceding March 1. At least

65 percent of this minimum hourly wage package must be paid to the apprentice as taxable wages;

(2) If there is no prevailing hourly wage package and wage package progression determined by the Director for journeymen for the apprenticeable occupation and geographic area, a starting wage rate decided by the sponsoring program in consultation with and subject to the approval of the Chief DAS based on consideration of the minimum starting hourly wage package and wage package progression for apprentices in the most analogous occupations and geographic areas;

(3) Where an employer elects to satisfy a portion of the hourly wage package by employer payments for employee benefits as defined in 8 C.C.R. §16000, the payment of such contributions must be verifiable and the cost of the benefit(s) must be reasonably related to the amount of the contribution(s). The employer shall submit its books and records to an audit by the DAS staff, upon request, to verify such payments;

(4) Where an employer elects not to satisfy a portion of the apprentice's hourly wage package by employer payments for employee benefits as defined in 8 CCR §16000, the employer shall pay the entire hourly wage package to the apprentice on the apprentice's paycheck. Where an employer elects to satisfy a portion of the apprentice's hourly wage package by employer payments for employee benefits, the employer shall pay the remainder of the apprentice's hourly wage package to the apprentice in the apprentice's paycheck;

(5) The minimum hourly wage package shall increase for each successfully completed period of apprenticeship to a higher percentage of the prevailing per diem wage package

for journeymen in the apprenticeable occupation and geographic area of the project. These periodic increases in percentage shall be equal (e.g., 40 percent, 50 percent, 60 percent, etc.) and shall be such that the minimum hourly wage package in the final period of apprenticeship is not less than 80 percent of the prevailing per diem wage package for journeymen in the apprenticeable occupation and geographic area of the project, as determined by the Director, using the rate effective on the immediately preceding March 1. At least 65 percent of this minimum hourly wage package must be paid to the apprentice as taxable wages;

(6) In the alternative, a contractor will be in compliance with this entire subsection (c) if the contractor provides the same total hourly wage package and wage package progression to apprentices employed on private projects as the contractor provides to apprentices employed on public works projects in the same geographic area, and that total hourly wage package is not less than the prevailing per diem apprentice wage package for the apprenticeable occupation and the geographic area of the project;

(7) Existing apprenticeship programs already approved by the DAS and the CAC which are not in compliance with any aspect of this Subsection (c) shall have until February 17, 2002, to come into full compliance;

(8) By the enactment of this regulation, it is not the CAC's intent to change the manner by which the Director of Industrial Relations currently determines the prevailing wage rate, and the provisions of this Subsection (c) shall not be used to determine the prevailing wage rate.

(9) After February 17, 2002, all contractors employing registered apprentices shall pay not less than the minimum wages required by this subsection (c).

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

CITY OF LONG BEACH, Plaintiff and Respondent **v.** **DEPARTMENT OF INDUSTRIAL RELATIONS,** Defendant and Appellant.	S118450

Second Appellate District, Division Seven, No. B159333
Los Angeles County Superior Court No. BS072516
The Honorable David F. Yaffe, Judge

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INTEREST OF AMICUS CURIAE

Bill Lockyer is the Attorney General of California. The Attorney General "shall be the chief law officer of the State. It shall be the duty of the Attorney General to see that the laws of the State are uniformly and adequately enforced." (Cal. Const., art. V, § 13.)

The Attorney General files this brief pursuant to his responsibility as the public's lawyer. The issue of most general importance in this case is whether the payment of prevailing wages on public works projects in this state is "a matter of statewide concern." Our Legislature has already found and declared: "It is a matter of statewide concern that every public agency in California pay the prevailing rate of per diem wages to workers employed on public works projects undertaken by those public agencies." (Stats. 2002, ch. 892, § 1(a)(3).) In reaching this conclusion, the Legislature stated: "Payment of the prevailing wage rate of per diem wages to workers employed on public works projects is necessary to attract the most skilled workers for those projects and to ensure that work of the highest quality is performed on those projects." (Stats. 2002, ch. 892, § 1(a)(1).) The Legislature also stated: "Public works projects should never undermine the wage base in a community, and requiring that workers on public works projects are paid the prevailing rate of per diem wages ensures that wage base is not lowered." (Stats. 2002, ch. 892, § 1(a)(2).)[1] Although the Legislature's judgment is not conclusive on the issue of whether a

[1] The Legislature also made the same findings and declarations in regard to public works in California undertaken by school districts. (Stats. 2002, ch. 868, § 1(a)-(c).)

particular matter is of statewide concern, "it is well settled that this court will accord 'great weight' to the Legislature's evaluation of this question." (*Baggett v. Gates* (1982) 32 Cal.3d 128, 136.)

In the proceedings below, the California Department of Industrial Relations ("DIR") advanced the Legislature's position set forth above, and the Legislature's position was ultimately confirmed by the Court of Appeal. In answering the brief filed by the City of Long Beach in this Court, however, the DIR declines to take a position on the "statewide concern" issue and urges this Court to affirm the Court of Appeal's decision based on its alternative ruling that the project in question was not "a municipal affair." The Attorney General files this brief to affirm the position of this Office that the payment of prevailing wages on public works programs in this State *is* "a matter of statewide concern." Indeed in response to the decision by the Court of Appeal in this matter, the Legislature passed a resolution stating: "That the Legislature reaffirms its intent for the state prevailing wage law to apply broadly to all projects subsidized with public funds, including the projects of chartered cities, as the law addresses important statewide concerns." (Stats. 2003, res. ch. 135.)

As the public's lawyer, the Attorney General has a strong interest in giving effect to the voice of the public's elected representatives. Particular to the present matter, the Attorney General also has a strong interest in assuring application of the State's laws providing protections for workers on public projects in the State, both for the benefit of such workers and also for the benefit of all of the people of the State. The Attorney General agrees with the DIR that the Court of Appeal correctly determined that the

project in question was a public work, that it was not "a municipal affair," and that thus it is not truly *necessary* for this Court to reach the "statewide concern" issue to affirm the Court of Appeal's decision. The Attorney General nonetheless urges this Court to proceed to address the "statewide concern" issue in order to confirm the correctness of the Court of Appeal's decision on that issue, and thereby remove any possible uncertainty as to application of the State's prevailing wage laws to charter cities.

The Attorney General files this brief as of right under Rule 29.1(0(7) of the California Rules of Court.

SUMMARY OF ARGUMENT

The Attorney General agrees with the Court of Appeal's decision in this matter in all respects, and urges that this Court affirm the decision. That is, the Attorney General agrees with the Court of Appeal analysis concluding that the project in question was a "public work" as that term is defined under Labor Code section 1720. In addition, the Attorney General agrees with the Court of Appeal's conclusions that the project was subject to their State's prevailing wage laws: (1) the project was not a "municipal affair" such that City of Long Beach would have been exempted under section ***5***, subd. (a), of Article XE of the California Constitution; and (2) the State's prevailing wage laws address a matter of "statewide concern" and apply even if the project *as a "municipal affair."

Although this Court determined in *City of Pasadena v. Charleville* (1932) 215 Cal. 384,389, that at *that time* the State's law requiring payment of prevailing wages on local public works in the State did *not* address a matter of

statewide concern changes in the law and the work force since that time now call for a different conclusion As the Court of Appeal stated below, "[W]hat may once have been a strictly municipal affair has now become a matter of statewide concern and, therefore, chartered cities must comply with the state prevailing wage law when they engage private sector employees on public works."

The Attorney General urges this Court to affirm the Court of Appeal's determination that the State's prevailing wage laws address matter of statewide concern.

ARGUMENT

I.

THIS COURT IS NOT CONSTRAINED BY ITS 1932 DECISION IN *CITY OF PASADENA v. CHARLEVILLE* IN DETERMINING WHETHER THE STATE'S PREVAILING WAGE LAW ADDRESSES A MATTER OF STATEWIDE CONCERN TODAY.

California's charter cities are subject to the State's general laws, except that the California Constitution grants charter cities legislative autonomy over matters considered to be their "municipal affairs." (See Cal. Const., art. XI, § 5, subd. (a).) In addition, even with respect to a charter city's purely "municipal affairs," charter city autonomy gives way to general state law if the state law addresses a matter of "statewide concern." (*Baggett v. Gates* (1982) 32 cAL.3D 128, 136.) Leaving aside for the sake of analysis the question of whether the construction project at issue, involving the City of Long Beach and the Los Angeles Society for the Prevention of Cruelty to Animals ("SPCA-LA"), was a purely "municipal affair," the payment of prevailing wages on public works projects in

this State is a matter of "statewide concern." The Attorney General thus urges this Court to affirm, on such basis, the Court of Appeal's decision upholding application of the State's prevailing wage law to the SPCA-LA project.

In its decision more than 70 years ago in *City of Pasadena v. Charleville* (1932) 215 Cal. 384, 389, this Court made clear *at that time* that it held the contrary view: State laws requiring payment of prevailing wages on local public works in the State did *not* address a matter of statewide concern. Much has changed since 1932, and this Court should now confirm that, notwithstanding the circumstances that existed at the time of the *City of Pasadena* decision, payment of prevailing wages on local public works in the State has by now become a matter of statewide concern.

The principles of *stare decisis* present no obstacle to this Court's coming to a new conclusion on the statewide concern issue 70 years after its decision in *City of Pasadena.* "It is . . . settled that the constitutional concept of municipal affairs is not a fixed or static quantity. It changes with the changing conditions upon which it is to operate. What may at one time have been a matter of local concern may at a later time become a matter of state concern controlled by the general laws of the state." (*Pacific Telephone & Telegraph Co. v. City and County of San Francisco* (1959) 51 Cal.2d 766, 771.) "Matters once entirely local in nature may, in a society rapidly increasing in both complexity and interdependence, lose their 'strictly local' character and become 'matters of statewide concern.'" (*Weekes v. City of Oakland* (1978) 21 Cal.3d 386, 405 (conc. opn. of Richardson, J.).) In determining the question of whether a subject is of statewide concern, "courts should avoid the error of 'compartmentalization,'

that is, of cordoning off an entire area of governmental activity as either a 'municipal affair' or one of statewide concern." (*California Federal Savings & Loan v. City of Los Angeles* (1991) 54 Cal.3d 1, 17.)

In keeping with this guidance from the Court, the decision in 1932 addressing the State's prevailing wage law circumstances then existing does not control whether the State's prevailing wage law is today a matter of statewide concern. The determination as to whether a particular subject is a matter of statewide concern can change with the passage of time, and such has happened here.

II.

SINCE THIS COURT'S DECISION IN *CITY OF PASADENA v. CHARLEVILLE*, PAYMENT OF WAGES PURSUANT TO THE STATE'S PREVAILING WAGE LAW HAS BECOME A MATTER OF STATEWIDE CONCERN.

A. Issues Related To The Constitutionality Of State Minimum Wage Laws No Longer Exist.

At the time of the *City of Pasadena* decision, a significant consideration for the Supreme Court was that the State's prevailing wage law not be considered a species of general minimum wage, which at the time would have been considered unconstitutional. In proceeding with its evaluation of the Public Works Wage Rate Act of 1931, the Supreme Court stated: "The foregoing statute does not purport to fix or provide for the fixation of the wage to be paid under all employment contracts, public and private. If such was the declared purpose and intent of the act, difficulties of constitutional questions would be encountered." (*City of Pasadena*, *supra*, 215 Cal. at 390 [citing

Adkin's v. Children's Hospital (1923) 261 U.S. 525].) There was thus some question at that time as to whether the State's prevailing wage law was constitutional *at all*, let alone as applied to public works projects undertaken by charter cities.

Sensitive to the constitutional minimum wage pitfall, the Supreme Court was careful to portray the statute not as a statewide wage-fixing device, but instead as the Legislature's act "to prescribe conditions upon which the statute will permit work of a public character to be performed *for it or for public agencies of the state over which the Legislature may constitutionally exercise control.*" (*Id.* [emphasis added].) In justifying the State's prevailing wage law as pursuant to the State's proper interest in prescribing conditions on its public works, as opposed to any interest in establishing fixed wage rates, the Supreme Court thus avoided lumping the State's prevailing wage law together with the taboo concept of general minimum wages. But the analytical price paid was that the State's prevailing wage law would not apply generally to public works statewide; instead it would apply only to those public works of the State or other public agencies over which the Legislature could constitutionally exercise control. The resulting decision was thus that charter cities' public works would be considered municipal affairs not subject to the State's prevailing wage laws.

Today, of course, statewide general minimum wages have been recognized for many years as constitutionally acceptable. (See *West Coast Hotel Co. v. Parrish* (1937) 300 U.S. 379.) Indeed, the California Constitution since 1976 has expressly provided that "[t]he Legislature may provide for minimum wages and for the general welfare of employees." (Cal. Const., art. XIV, § 1.) There is thus no longer

any analytical need to avoid statewide application of the State's prevailing wage law.

B. The State's Prevailing Wage Law Has Developed From A Subject For Respective City Determinations, To State Determinations Based On Regional Data Administered By The Department Of Industrial Relations.

A second important change since 1932 has been in the administrative responsibility for, and geographical scope of, the actual determination of the prevailing wages pursuant to the State's prevailing wage law.

As this Court described the original process under the Public Works Wage Rate Act of 1931, the law required "that *the public body awarding any contract* for public work on behalf of the state or of any county, city, city and county, district, or other political subdivision of the state, shall ascertain the general prevailing rate of per diem wage *in the locality* in which the work is to be performed for each craft or type of workman required for the performance of the contract, and shall specify such rate of wages in the call for bids and in the contract subsequently awarded." (*City of Pasadena*, *supra*, 215 Cal. at 389-390 [emphasis added]; see Stats. 1931, ch. 397, § 2, p. 910.) For public works contracts not awarded by the State, the "locality in which the work is performed" was defined as "the limits of the county, city and county, city, town, township, district or other political subdivisions on whose behalf the contract is awarded." (Stats. 1931, ch. 397, § 4, p. 912.) For a city public works contract, the law thus called for *the city* to ascertain the applicable prevailing wages, and to determine the applicable prevailing wages

according to the wages paid *within the city limits*: The city's determination was final. (*Id.*)

In contrast, today it is the Director of the DIR who is responsible for determination of applicable prevailing wages, regardless of whether the public works contract is state or local. (See Labor Code, § 1770.) The Director's determinations are made pursuant to a comprehensive set of State guidelines, and any disputes in regard to the determinations are subject to administrative review by the Department and ultimately judicial review. (See Labor Code, §§ 1770-1781; Cal. Code Regs., tit. 8, §§ 16000-16414.) In particular, local prevailing wage determinations are no longer based on wages within city limits, but are instead a function of prevailing wages "in the nearest labor market area." (See Labor Code, § 1773.)

The State's prevailing wage law has thus itself developed over time from a subject for respective *city* final determinations, to state determination based on regional data administered by the DIR.

C. Apprenticeship Programs Integrated Into The State's Prevailing Wage Law Affirm The State's Interest In Training A Skilled Construction Workforce.

A third important change since this Court's decision in *City of Pasadena* has been the Legislature's integration of apprenticeship programs into the State's prevailing wage law. The apprenticeship provisions require contractors on public works projects to employ apprentices. (See Labor Code, § 1775, subd. (d).) These provisions also set up a second tier of prevailing wages applicable to apprentice-level employees on public works

who are enrolled in state-approved apprenticeship programs. (See Labor Code, § 1777.5, subd. (b), (c).) As a result, these provisions allow public contractors that employ apprentices in training under approved standards to be competitive on bids for work on public projects. The prevailing wage law thus encourages contractor participation in the State's apprenticeship programs. The requirement that public works contractors hire apprentices and the coordinated system of tiered prevailing wages contribute to the steady renewal of a skilled work force in the State, which is a fair subject for statewide concern.[2]

D. The Increased Mobility Of Workers Has Expanded The Boundaries Of The Relevant Labor Markets.

Finally, the economic environment in which public works in California are accomplished has changed dramatically since 1932. With more efficient transportation and more mobile workers able to travel longer distances to work sites, the local labor markets have evolved into what are at least regional markets. As this Court stated in the course of concluding that the Public Safety Officers' Procedural Bill of Rights Act addressed a matter of statewide concern and thus could constitutionally be applied to charter cities:

> The consequences of a breakdown in [relations between police officers and their employers] are

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[2] "The Legislature finds and declares that apprenticeship programs are a vital part of the educational system in California." (Stats. 1999, ch. 903, § 1.)

> not confined to a city's borders. These employees provide an essential service. Its absence would create a clear and present threat not only to the health, safety and welfare of the citizens of the city, but also to the hundreds, if not thousands, of nonresidents who daily visit there. Its effect would also be felt by the many nonresident owners of property and businesses located within the city's borders. *Our society is no longer a collection of insular local communities. Communities today are highly interdependent.* The inevitable result is that labor unrest and strikes produce consequences which extend far beyond local boundaries.

(*Baggett*, *supra*, 32 Cal.3d at 140 [emphasis added].) In the same vein, in this day and age of community interdependence it does not make sense to consider the construction labor market to be a strictly local matter. Changes in the market have contributed to making the payment of prevailing wages on public works in this State a statewide concern.

CONCLUSION

The only other Court of Appeal to address the present question agreed that the State's prevailing wage law addresses a matter of statewide concern, recognizing that the purposes of the law

> include protecting employees from substandard earnings if contractors could recruit labor from distant cheap-labor areas; allowing union contractors to compete with nonunion contractors for public works; the benefit to the state of superior efficiency arising from well-paid labor; and the need to compensate nonpublic employees with

higher wages since they do not have the steady employment and fringe benefits that public employees enjoy.

(See *Division of Lab. Stds. Enforcement v. Ericsson Information Systems, Inc.* (1990) 221 Cal.App.3d 114, 123.) Here, for the reasons described above, the Court of Appeal correctly held that "California's prevailing wage law is a matter of statewide concern and therefore applies to chartered cities contracting for public works regardless of whether the project itself is strictly a municipal affair."

Dated: February 19, 2004

Respectfully submitted,

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